(1984) 09 DEL CK 0003

In the Delhi High Court

Case No : Civil Writ Petition No. 591 of 1971

Bansidhar Ramgopal APPELLANT

Vs

Director of Enforcement and Others RESPONDENT

Date of Decision : 26-09-1984

Acts Referred:

Citation : (1985) 8 DRJ 7

Hon'ble Judges : Charanjit Talwar, J

Bench : Single Bench

Advocate : D.P. Sharma, Valmiki Mehta, Rekha Sharma and S.P. Singh, for the Appellant;

Judgement

Charanjit Talwar, J.

(1) M/S. Bansidhar Ramgopal petitioner in Civil Writ No. 590 of 1971 and M/s.Bansidhar Biharilal petitioner in Civil Writ No. 591 of 1971, have challenged the two show cause notices issued to them on 10th October, 1969, for contravention of the provisions of Section 12(2) of the Foreign Exchange Regulation Act, 1947, (hereinafter called the ''1947 Act'') read with Central Government Notification No. 6(8)-EF-II/52, dated 22nd April, 1952. The said notices in both the cases are in identical terms and a copy thereof has been annexed as Annexure ''E'' to each of the Writ petitions. They were issued by Shri M.G. Wagh, Director, Enforcement Directorate, Ministry of Finance, Department of Revenue & Insurance, Government of India The petitioners have further impugned the decision taken by the said Director vide letter of 8th June, 1970 (copy Annexure ''F'') to hold adjudication proceedings as contemplated u/s 23D of 1947 Act. This decision was taken after considering the reply of the petitioners to the above said show cause notice. At the outset it is useful to quote the show cause notice issued to M/s. Bansidhar Ramgopal which is identical to the one issued to M/s. Bansidhar Biharilal. It reads :-

Enforcement directorate Ministry Of Finance Department Of Revenue And

Insurance Government Of India No. II: (184)/68 Room No. 227, North Block New Delhi. Memorandum Whereas it appears that during the year 1962 M/s. Bansidhar Ramgopal, 5/22B, Roop Nagar, Delhi effected 189 shipments of Indian merchandise valued at Rs. 8,46,723.40 to Afghanistan (as per details given in the annexure attached) against the undertaking given by them to the Reserve Bank of India to the effect that they would either equalise the value of the goods exported with the import of goods from Afghanistan in the like amount or receive the payment in Indian Rupees from the account of a bank in Afghanistan within the prescribed period ; And Whereas it further appears that the said M/s. Bansidhar Ramgopal have neither imported the goods in the like amount from Afghanistan nor realised the full export proceeds in rupees from the account of a bank in Afghanistan so far in fulfillment of the undertaking given by them to the Reserve Bank. And Whereas failure to realise the full export value of the goods from the country of final destination of the goods within three months from the date of shipment of the goods in the prescribed manner is a contravention of the provisions of Section 12(2) of the Foreign Exchange Regulation Act,'' 1947, read with Central Government Notification No. 6(8)-EF. II/52 dated the 22nd April, 1952. And Whereas by failure to realise the full export value of the said shipments from the concerned foreign consignee within three months from the date of the said shipments, in the prescribed manner, the said M/s. Bansidhar Ramgopal and S/Shri Rajpal Aggarwal and Jawahar Lal Jawahar being their partners appear to have contravened the provisions of Section 12(2) of the foreign exchange regulation Act, 1947, read with Central Government Notification No. 6(8)-ENF-II/52 dated the 22nd April, 1952, and have thereby rendered themselves liable to be proceeded against u/s 23(1)(a) of the said Act. Now Therefore the said M/s Bansidhar Ramgopal and S/Shri Rajpal Aggarwal, Jawahar Lal Jawahar, partners of the said M/s. Bansidhar Ramgopal and hereby required to show cause within 14 days of the receipt of this Memorandum why adjudication proceedings should not be held against them for the said contravention as contemplated in Section 23D of the Foreign Exchange Regulation Act and why personal penalty u/s 23 should not be imposed on the partners of the said firm. Dated at New Delhi this day of October One Thousand Nine Hundred and Sixty Nine. sd/- M.G. Wagh, Director. Enforcement Directorate, Ministry of Finance Department of Revenue & Insurance, Government of India.

According to the petitioners the show cause notices are without jurisdiction. However, before noticing the rival contentions, it is necessary to notice a few facts.

(2) The petitioners In these two writ petitions are sister concerns. They had exported goods to Afghanistan of the value of Rs. 16.90 lakhs under a bilateral trade agreement between the Governments of India and Afghanistan. At the relevant time in the years 1961-62 the exporters exporting goods to Pakistan and Afghanistan were permitted to retain the proceeds of their exports and to utilize them for payment of imports from those countries into India subject, however, to a special arrangement to be made by them with the Reserve Bank of

India. They were also required to give a declaration. It is the case of the petitioners that prior to exporting of the goods they gave the following declaration :

"WE hereby undertake that we will effect the matching imports within three months from the date of the corresponding exports."

It is averred that due to unsettled conditions at the relevant time because of a coup, the Afghanistan nationals to whom the goods had been exported who in turn had undertaking to export goods to India, had left that country and, Therefore, the petitioners were unable to effect the matching imports. The petitioners have further averred that they were ready and willing to import goods from those countries with whom they had dealings and where Afghan businessmen had settled but that was only possible if the Government granted them the Custom Clearance Permits from the General Currency Area. They further aver that at one stage after their representative had met the Minister such a permission was granted for the value of Rs. 8.45 lakhs to enable the petitioners to import goods from Iran but subsequently the petitioners were not permitted to utilize the whole of that permit.

(3) It is not necessary to go into the factual position as averred in the petition as I am deciding the two writ petitions purely on a question of law.

(4) The argument of the petitioners is that Section 12(2) of the 1947 Act was not applicable in the present case in which the exports had been effected whereby the sales had already taken place. The provisions, contravention of which has been alleged, applies only to consignment sales, i.e.. the sales which had yet to take place. Section 12(2) of the 1947 Act reads as follows:-

"12.Paymentfor exported goods-(1).......... .... (2) Where any export of goods has been made to which a notification under Sub-section (1) applies, no person entitled to sell, or procure the sale of, the said goods shall, except with the permission of the Reserve Bank, do or refrain from doing anything or take or refrain from taking any action which has the effect of securing that: (a) the sale of the goods is delayed to an extent which is unreasonable having regard to the ordinary course of trade, or (b) payment for the goods is made otherwise than in the prescribed manner or does not represent the fill amount payable by the foreign buyer in respect of the goods, subject to such deductions, if any, as may be allowed by the Reserve Bank, or is delayed to such extent as aforesaid : Provided extent which is unreasonable having regard to the ordinary course of trade: Provided that no proceedings in respect of any contravention of the provisions of this sub-section shall be instituted unless the prescribed period has expired and payment for the goods representing the full export value has not been made in the prescribed manner within the prescribed period."

A bare reading of the two provisions as quote above shows that the present sub-section applies to both the categories of persons to whom Sub-section (1) of Section 18 ''(Section 12 of 1947 Act) is applicable. A person who had made exports and also a person who is contemplating to export by sale are now covered. Previously, under Sub-section (2) of Section 12 of the 1947 Act a person who was "entitled to sell, or procure the sale of" could only be brought within the purview of Sub-section (2).

(5) Mr. D.P. Sharma, learned counsel for the petitioners, in support of his submission that the impugned notices dated 10th October, 1969, being contrary to the provisions of Sub-section (2) of Section 12, are invalid, relies on a full Bench decision of the Calcutta High Court in The Jay Engineering Works Ltd. Vs. M.G. Wagh and Others, . In that case also the notice of initiation of adjudication proceedings u/s 23-D had been issued by the Director of Enforcement on the ground that the exporter had failed to realise the export value of the goods from the country where those goods were exported within six months from the date of shipment which was contrary to Sub-section (2) of Section 12 of the Act. It was held that Section 12(2) as it stood before amendment applied to sales on consignment basis only and did not apply to sales already effected before export.

(6) The facts in the present cases are more or less similar. The petitioners had admittedly effected the export of the goods and thereby completed the sale. They would thus not come within the description of "no person entitled to sell or procure sale of" in Section 12(2) of the 1947 Act. The Calcutta High Court held the notice to be invalid also on the ground that the limitation specified therein for Realizing the value of the exports was had as laying down of the period was contrary to the main provision contained in Sub-section (2) of Section 12. It is true that the proviso in the unamended sub-section did refer to prescribed period yet the Calcutta High Court held that that could not affect the main provision in the section itself. With great respect I agree with the reasoning and conclusions contained in the said judgment.

(7) Following the law laid down in the above-cited authority of the Calcutta High Court I quash the impugned show cause notices (Annexure ''E'') and the impugned order for holding adjudication proceedings (Annexure F'').

(8) Before parting with this case I may notice that counsel for the respondents pressed the preliminary objection taken in the counter affidavit, i.e., that since under the Act an appeal was provided, this Court ought not exercise its jurisdiction under Article 226 of the Constitution as the petitioners have not exhausted their remedy by way of filing an appeal. The objection taken is misconceived as in the present case the issuance of the impugned orders was without jurisdiction. In a case like the present there is no bar to the exercise of jurisdiction under Article 226 of the Constitution. In fact the very first ground which has been enumerated in a Division Bench decision of this Court in I.T.C. Limited and another v. Union of India and Others 1983 E.L.T. 1 (Del) is that the jurisdiction under Article 226 of the Constitution can be exercised when the impugned order is without jurisdiction.

(9) The result is that the writ petitions are allowed and the impugned show cause

notices and orders are quashed. No order as to coast. Rejection itself. With great respect I agree with the reasoning and conclusions contained in the said judgment.

